EDITOR'S NOTE

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ORIGINAL

No. 85-6756

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY MEASURED THE CLAIMS AGAINST THE RECORD FACTS IN RESOLVING THE ISSUES CONCERNING THE PRESENTATION OF MITIGATING EVIDENCE AND PLEA DISCUSSIONS?

WHETHER AN EN BANC JUDGMENT OF A COURT OF APPEALS WHICH IS TOTALLY CONSISTENT WITH PRIOR PRECEDENT OF THAT COURT AND THIS COURT BUT AT ODDS WITH ONE PANEL DECISION IS SUFFICIENT REASON TO GRANT CERTIORARI REVIEW?

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OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondent, Louie L. Wainwright, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's judgment in this case.

STATEMENT OF THE CASE

On January 21, 1977, Hitchcock was found guilty of the first degree murder of Cynthia Ann Driggers. (R 166) The evidence presented at trial showed that approximately two weeks prior to the murder, Hitchcock, unemployed, ill, and with no place to live, came to Winter Garden, Florida, to stay with his brother, Richard. Hitchcock knew that coming to Florida was in violation of his Arkansas parole. (R 779)

Cynthia Ann Driggers, thirteen years old, was Richard Hitchcock's step-daughter. On the night of the murder, James Hitchcock went out with some friends, drank some beer, and smoked some marijuana. In a statement given to the police, Hitchcock

revealed that upon returning to his brother's house, he went into Cynthia's bedroom at about 2:30 a.m. (R 691) He had sex with Cynthia, and afterwards she stated that she was hurt and was going to tell her mother. Hitchcock told her that she could not, and she began hollering. Hitchcock grabbed her by the neck, and in an effort to silence her, picked her up and carried her outside to the yard. He told her that she could not tell her mother, and she began to scream. He grabbed her by the throat and began choking her, and when he released his grip, she again began to scream and cry out. Even though he hit her twice, she continued to scream; so Hitchcock choked her and "just kept chokin' and chokin'" and after she was still, he pushed her over in the bushes and went back in the house, took a shower, washed his shirt and went into his bedroom and lay down. (R 691-692) Medical evidence showed that Cynthia Ann Driggers was, before the incident, a virgin.

Hitchcock testified at trial and admitted going into Cynthia's room but stated that the sex was voluntary on her part. He stated that he was sitting on the bed putting his pants back on when his brother Richard came in, grabbed Cynthia, and pulled her out of the house. He followed and tried to prevent Richard from choking his own step-daughter. (R 765) According to James Hitchcock, he could not break his brother's grip and after a time, it was determined that Cynthia was dead. Again, according to James, he told his brother Richard to go into the house and that he would take care of the matter and then took Cynthia's body and put it in the bushes. (R 766)

After a verdict of guilty was returned, the advisory sentencing phase of the proceeding was held. At the conclusion thereof, the jury recommended that Hitchcock be sentenced to death. (R 184) The trial judge, in agreement with that recommendation, sentenced Hitchcock to death finding that the capital felony was committed while Hitchcock was engaged in the commission of sexual battery upon Cynthia Ann Driggers; that the capital felony was committed for the one purpose of avoiding being arrested for the involuntary sexual battery; and that the

capital felony was especially heinous, wicked or cruel. (R 196-197)[1] In terms of mitigation, the trial court found that Hitchcock's age, twenty, was applicable. Weighing the aggravating factors against the sole mitigating circumstance, the trial court agreed with the recommendation of the jury and found that the recommendation was amply supported by the evidence. (R 198). Hitchcock appealed his judgment of guilt and sentence of death to the Florida Supreme Court and in his brief dated August 15, 1979, containing some fourteen separate issues, contended as a point on appeal that the decision on the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), unconstitutionally limited consideration of mitigating evidence in violation of this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978).On February 25, 1982, that court affirmed both the conviction and sentence, Hitchcock v. State, 413 So.2d 741 (Fla. 1982), finding on this particular issue, that Florida law allowed the presentation of all relevant mitigating circumstances and that the record failed to reveal that the trial judge in any way limited the defense's presentation. 413 So.2d at 748.

Hitchcock then sought a petition for writ of certiorari from this Court raising three questions. None of these questions concerned the operation of Florida law in terms of presentation of mitigating evidence. Parenthetically, Hitchcock did raise the issue relating to the so-called agreement of life imprisonment upon a plea. The petition was denied. Hitchcock v. Florida, 459 U.S. 960 (1982).

On April 21, 1983, the Governor of Florida denied clemency and signed Hitchcock's death warrant. Hitchcock then promptly filed a motion to vacate his death sentence pursuant to Florida

[1]The trial court also found that Hitchcock had been previously convicted of five burglaries and was on parole at the time he committed the capital felony. However, since Hitchcock was not under a sentence of imprisonment at the time, the trial judge did not find the aggravating factor contained in section 921.141 (5)(a), Florida Statutes to be applicable. However, as noted by the Florida Supreme Court upon direct review of the conviction and sentence, the fact of parole is, under Florida law, sufficient to satisfy this aggravating factor. See, Hitchcock v. State, 413 So.2d 741 (Fla. 1982) at 747, n. 6.

Rule of Criminal Procedure 3.850. As one of the grounds presented in that motion, Hitchcock argued that he received ineffective assistance of counsel due to the belief of counsel that he was restricted to presenting evidence in mitigation to that found only in Florida's statute. The motion was denied without an evidentiary hearing. On appeal, the denial was affirmed, the Florida Supreme Court finding, on this issue, that it was but the same claim, in different form, that was argued and considered on direct appeal. Hitchcock v. State, 432 So.2d 42, 43 (Fla. 1983). In a concurring opinion, Justice McDonald observed that Hitchcock's lawyer presented and argued non-statutory mitigating evidence such that a claim that counsel was in doubt as to the applicability of such evidence was belied. 432 So.2d at 44, (McDonald, concurring).

Hitchcock then sought federal habeas corpus relief in a petition raising some fifteen separate challenges to his conviction and/or sentence. After reviewing the challenges and the state trial record, the district court dismissed the petition without a hearing pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

An appeal was taken to the Eleventh Circuit Court of Appeals and that court affirmed the summary dismissal. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984). A suggestion for rehearing en banc was filed and granted. After briefing and argument, the en banc court of the Eleventh Circuit affirmed the judgment of the district court. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc). Rehearing was denied. Hitchcock v. Wainwright, 777 F.2d 628 (11th Cir. 1985).

REASONS FOR NOT GRANTING THE WRIT

Hitchcock's first claim may be broken down into two propositions which, though separate, are nevertheless necessarily dependent such that examination of both is required. Hitchcock contends that the decision of the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), limited evidence of mitigating circumstances to those statutorily enumerated in

Section 921.141 (6), Florida Statutes. He then builds upon this premise to contend that because of this perceived limitation, his trial counsel failed to investigate and present evidence of a non-statutory nature with the end result that he was denied an individualized capital sentencing determination.

STATUS OF FLORIDA LAW

An examination of the decision in Cooper v. State, supra, reveals the court's holding on this issue was a mere four paragraphs of judicial expression. Pertinent language is directed only to a claim raising alleged error surrounding the trial court's refusal, on grounds of relevance, certain testimony proffered during the penalty phase of Cooper's trial relating to his employment history, the victim's reputation for violence, and Cooper's attempt to avoid his co-perpetrator on prior occasions. The defense sought to have this testimony admitted to show that the co-perpetrator (killed during the incident) had probably fired the fatal shots, and that Cooper was not beyond rehabilitation. Importantly, while the trial court rejected these proffers of evidence, other questionably probative or relevant evidence regarding general character and reputation for truthfullness and non-violence was admitted into evidence. 336 So.2d at 1139.

In holding that the refusal to admit the proffered evidence was not error, the Florida Supreme Court predicated its judgment on its previous decision in State v. Dixon, 283 So.2d 1 (Fla. 1983), stating that only evidence bearing relevance to the issues was to be admitted during this phase of a capital proceeding. Although the factors in mitigation listed in the statute were mentioned, the holding was nonetheless bottomed only on a notion of relevance. This is precisely what was confirmed in Songer v. State, 365 So.2d 696 (Fla. 1978), and, more importantly, specifically reiterated in Cooper v. State, 437 So.2d 1070 (Fla. 1983).

Songer, supra, contains reference to numerous decisions where non-enumerated mitigating circumstances were presented to

the sentencer and, as pointed out by the district court below, some of those decisions were published prior to Hitchcock's trial. The Florida Supreme Court relied upon the decisions as representing its approval of the consideration of non-statutory mitigating factors.

In Meeks v. State, 336 So.2d 1142 (Fla. 1976), the trial court considered the "dull-normal intelligence" of the defendant and found it a mitigating fator. In Buckrem v. State, 355 So.2d 111 (Fla. 1978), and Chambers v. State, 339 So.2d 204 (Fla. 1976), the court recognized voluntary intoxication and drug use. In Hallivell v. State, 323 So.2d 557 (Fla. 1975), the fact that the defendant was under an emotional strain over mistreatment of his girlfriend by the deceased and his status as a Vietnam veteran were mentioned. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), the fact that the defendant was not the trigger-man was utilized as a basis to reduce the sentence to life imprisonment. In Messer v. State, 330 So.2d 137 (Fla. 1976), the court specifically held that the punishment received by a co-defendant in a separate trial was improperly excluded from the jury because it was relevant, citing to its earlier decision in Slater v. State, 316 So.2d 539 (Fla. 1975). Obviously, punishment received by a co-defendant in separate trials is not a statutorily enumerated circumstance; yet, it was found admissible because of relevancy to the ultimate issue.

Relevance is the operative word in the presentation of mitigating evidence, whether statutory or otherwise. This was recognized in Lockett v. Ohio, 438 U.S. 586 (1978). There the Court was concerned with a record in a murder trial which, as the Court seemed to emphasize, contained no evidence of guilt, and a conviction would not have been obtained but for the operation of an aiding and abetting statute. The actual killer (trigger-man) pleaded guilty and escaped the penalty of death in return for an agreement to testify against Lockett, her brother, and another perpetrator. The sole participation of Lockett in the offense was the driving of the getaway car. The prosecution offered a plea to a considerably lesser included offense and a

substantially reduced sentence three separate times.

Against this backdrop of evidence, the Court centered upon the particulars of Ohio's capital sentencing statute. Under that law, in order to avoid a mandatory death sentence upon the proving of at least one of seven specified aggravating circumstances, a capital defendant was limited to showing by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) it was unlikely that the offense would have been committed but for the fact that the defendant was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency.

Based on the above facts and law, the holding of this Court was that the Eighth and Fourteenth Amendments required that the sentencer not be precluded from considering as a mitigating factor, any aspect of the defendant's character and record or any evidence concerning the circumstances of the offense that the defendant proffered as a basis for a sentence less than death, provided that the evidence is relevant. As a specific refinement of this general notion, the Court stated:

> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

438 U.S. at 608. Put another way, the Ohio statute was simply too restrictive in terms of relevance.

Since Florida's law was not only more expansive in its list of relevant mitigating factors but also provided for the receipt of all relevant evidence, the Florida Supreme Court was correct in concluding that Lockett did not affect the operation of our capital sentencing scheme. Florida's law was specifically mentioned as an obvious example of a non-limiting capital statute. 438 U.S. at 606, n. 15. The source of this notion is, of course, Proffitt v. Florida, 428 U.S. 242 (1976). Hitchcock easily ignores Proffitt by focusing on the six-day period elapsing between Proffitt and Cooper, thus adopting the view of

Mr. Justice BRENNAN in the dissent from the denial of a petition for writ of certiorari in Songer v. Wainwright, ___ U.S. ___, 105 S.Ct. 817 (1985). As we understand the thrust of the contention, since Proffitt so closely preceded Cooper, Cooper was decided without knowledge of Proffitt, and thus the Florida Supreme Court unwittingly reached an interpretation of the statute contrary to that of this Court. The implicit extension of this position is that the Florida Supreme Court, either through possible embarrassment or stubbornness, refused to mend its error and did not do so until and because Lockett was decided. In other words, Songer was the Florida Supreme Court's effort to save Florida's statute in response to Lockett.

This viewpoint is both incorrect and unfair insofar as it suggests or assumes an improper motive of behalf of the Florida Supreme Court. More importantly, it overlooks the fact that the decision in Cooper was on rehearing from July 8, 1976, until September 30, 1976, an ample period within which the Florida Supreme Court could have become familiar with the ". . . details in Proffitt's footnotes . . ." 105 S.Ct. 821, n.9. That the Florida Supreme Court "did nothing" between Cooper and Songer is due to no other obvious reason than the fact that Songer was the first person to raise the direct constitutional challenge as a result of the decision in Lockett.

Based on the above, we submit that Florida's capital sentencing law was at no time capable of an unconstitutional application, whether before or after Cooper. Based on the preceding analysis, we do not share the view that there existed any "confusion" or "ambiguity" in Florida law. Giving Hitchcock's contention the benefit of every doubt, the very best that emerges is the possibility that either the untrained or less than diligent lawyer who did nothing but read Cooper, might be confused. This possibility naturally leads to the following discussion of the issue decided by the court of appeals.

RESTRICTION OF MITIGATING EVIDENCE IN THIS CASE

As the court of appeals observed, a number of Florida capital

prisoners have raised the concept of restriction in mitigation in varying contexts. 770 F.2d at 1517. The court of appeals reaffirmed, en banc, that it would continue to consider the claim on a case-by-case basis, evaluating the impact of Florida law on each individual capital sentencing hearing. In the Eleventh Circuit, the court announced:

> ". . .that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing." Id.

Applying the above-quoted analysis, the court of appeals determined, as did the Florida Supreme Court and the federal district court, that the record of Hitchcock's trial belied the argument that the attorney for Hitchcock believed himself to be limited. The court went on to note examples where the lawyer raised matters and intended them to be circumstances in mitigation which were not listed in the statute.

The court of appeals considered the affidavit of trial counsel. Considering it to be "carefully written", the court failed to find sufficient evidence of restrictive belief. The affidavit states only that counsel had reviewed the trial transcript in Hitchcock's case and was of the then present opinion that his perception was that the consideration of mititgating circumstances was limited to the factors enumerated in the statute. Counsel believed that his review of the transcript indicated that he was acting in accord with such a perception. While he believed that the statute limited the consideration, he did not recall when his perception changed. In fact, the contents of the affidavit were slightly misperceived by the court of appeals. Contrary to the court's understanding, counsel did not swear that he did not investigate relevant

mitigating circumstances. Rather, he swore only that he was aware of the then current status of the case in the state court and that in that court, a claim had been made that available evidence of relevant non-statutory mitigating circumstances was not investigated or presented. No where in the affidavit did counsel incorporate, ratify or otherwise adopt that allegation; he was not involved in the state court action which consisted of a motion to vacate filed subsequent to the signing of the death warrant. (Counsel's affidavit has been appended hereto at pages A 1-A 2.)

Interestingly, the decision in Cooper v. State, supra, is not even mentioned. Also, any stated belief of restriction is not alleged in the affidavits; the best counsel could provide was his stated perception of such a belief. However, that perception is rendered worthless by the direct statement that counsel had no independent recollection of whether he believed himself limited.[2]

In response to an issue which can and will be raised only from the State of Florida and in only the one court of appeals, the Eleventh Circuit has formulated a case-by-case approach in resolving the merits of a given claim. The formulation of that analysis has created no conflict with a decision of any other court of appeals nor with a decision of this Court. It has created no tension between the Eleventh Circuit and the Florida Supreme Court. Indeed, both tribunals have granted relief in cases in which the record demonstrated a restriction on the presentation of mitigating evidence. See, Perry v. State, 395

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[2]We have also appended the second affidavit of trial counsel (A 3 - A 6) which Hitchcock attached to his petition for rehearing en banc in an effort to persuade the court of appeals, in light of its holding, that the attorney believed himself limited. Even that affidavit did nothing to require the need for an evidentiary hearing. Though longer than the first, it was not significantly or materially different. The affidavit was still predicated on counsel's eight-year-old perception and interestingly, the final paragraph is replete with the tentative language: "may have been significantly different"; "may have developed"; "may have included evidence." Most importantly, counsel still did not swear that he did not investigate all possible areas of mitigation. Also, he did not mention Cooper v. State, supra, and he did not identify any source of perceived limitation. The second affidavit was just as carefully written as the previous one.

So.2d 170 (Fla. 1980); and after this Court's denial of certiorari in Songer, supra, the Eleventh Circuit reversed a denial of a writ of habeas corpus. Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc).[3] Hitchcock presents this question in an effort only to quarrel with the determination of the court of appeals that the trial record did not support the claim that trial counsel was restricted in presenting any evidence in mitigation. That finding was proper and is fully supported by the record.

Indeed, practically the first thing that Hitchcock's lawyer told the jury in his summation during the advisory sentence proceeding was that they were to consider anything they felt relevant. (A 8) He mentioned insight into Hitchcock's background and his upbringing for whatever purpose deemed appropriate. (A 9) After revealing Hitchcock's less than exemplary childhood, counsel mentioned the episode of inhaling gas fumes as well as the fact that Hitchcock was not a violent person in the past. Counsel reminded the jury that Hitchcock had been truthful with them by mentioning that he was on parole. (A 11) Also mentioned was the prospect of rehabilitation (A 19), and that Hitchcock, instead of running away, turned himself into the authorities. (A 20) These matters clearly have no relationship to the statutorily enumerated circumstances in mitigation. Yet, they were presented to the jury in an effort to secure a recommendation of life imprisonment. This is the record which Hitchcock ignored when making the claim that he was denied a constitutionally proper sentencing hearing because of a restricted belief of counsel. The Florida Supreme Court, the federal district court, and the court of appeals all concluded that the claim lacked factual support. To request this Court to reject those findings of fact is an insufficent basis upon which to properly receive a writ of certiorari.

PLEA DISCUSSIONS

[3]A petition for writ of certiorari filed by the state is pending in Wainwright v. Songer, Case No. 85-567.

The facts giving rise to this claim are only touched upon in the decision of the court of appeals and then, only in that part of the dissenting opinion in which two of the twelve judges agreed.

On February 4, 1977, the jury recommended that the death sentence be imposed. (R 184) On February 11, 1977, court convened for purposes of sentencing. At that time, counsel for Hitchcock reminded the trial court of Hitchcock's poor family background and domestic situation, his age, and his capability of rehabilitation. As a reminder, counsel also stated:

> MR. TABSCOTT: "I would also remind the Court that prior to the trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.
>
> THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding because your client didn't want to consider any plea.
>
> MR. TABSCOTT: That plea was offered to him by the state and the Court, however. And, it is true that he declined to enter that plea,
>
> THE COURT: Any other matters?
>
> MR. TABSCOTT: No, sir.

770 F.2d at 1525.

Based on that meager exchange, Hitchcock, in his initial brief filed over two years later, on August 15, 1979, raised the point on appeal that the imposition of the sentence of death after a plea agreement of life imprisonment constituted a denial of his right to trial by jury, right to remain silent, and was a denial of equal protection.. (Appellant's brief on appeal, pp. 27-31) In its answer brief, the state noted the lack of factual support for the allegation that any plea agreement had ever been reached. In reply to this position, Hitchcock filed a motion seeking to supplement the record on appeal with an affidavit of Mr. Tabscott (A 22) which, rather curiously, was dated February 15, 1977, only four days after sentencing. The state objected to this improper expansion of the record on appeal, but the Florida Supreme Court, on December 20, 1979, granted Hitchcock's motion. In the face of this ruling, the state secured an

affidavit of the prosecutor (A 23), and filed its own motion to supplement the record.

At that juncture, by virtue of Hitchcock's efforts, the Florida Supreme Court was requested to make a determination whether the sentence of death was imposed only because Hitchcock chose to exercise his right to trial by jury. That court found that the factual allegation was not supported by the record as supplemented. The court determined that there was nothing in the record which even hinted that the trial court imposed the death penalty because Hitchcock chose to have a jury trial. Despite having the affidavit of trial counsel for over two years, Hitchcock made no attempt to factually develop his claim that a plea agreement had at one time been reached.[4]

Based on the record uncertainty, both the district court and the court of appeals proceeded on the assumption that there existed at one time an agreement that if Hitchcock pleaded nolo contendere to the crime of first degree murder, that the judge would have imposed a life sentence. While it is true that such an assumption was made, we do not believe it to be sufficiently supported, but in light of the disposition of the issue by both lower tribunals, such disagreement was unnecessary below.

The court of appeal's holding on this issue was that given the assumption upon which the court proceeded, there was nothing indicating that the sentence of death was imposed for any reason other than those expressed in the findings of fact as required by Florida law. No indication of vindictiveness was present and more importantly, the status of the case pre-trial and that after a determination of quilt and a recommendation of death obviously was not the same. As was the case in the discussion of the first question, the court of appeals did nothing more than review a record of proceedings in response to a claim which, it was determined, was not supported by that record. In so doing, the

[4]Had Hitchcock desired, he always had available to him a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. See, e.g. Thompson v. State, 351 So.2d 701 (Fla. 1977).

court of appeals created no conflict nor pass upon a either a novel question nor one of such great importance that needs addressing by this Court.

APPLICATION OF THE DEATH PENALTY

Resolution of this issue by the panel opinion as reinstated by the en banc court was based upon settled law within the circuit as well as decisions of this Court. 745 F.2d at 1342. See also, Wainwright v. Adams, ____ U.S. ____, 104 S.Ct. 2183 (1984), and Henry v. Wainwright, ____ U.S. ____, 105 S.Ct. 54 (1984). In light of the consistent line of decisions of the court of appeals and the just as consistent denial of either stays of execution or petitions for writ of certiorari by this Court, one has to conclude that Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985) is at the very least, a questionable decision. Considering the fact that only one judge on the Griffin panel participated in the en banc decision in Hitchcock, and then not on this issue, it is perhaps understandable why Griffin appears to stand alone in this regard. It certainly is why Florida is seeking a writ of certiorari in that case. Wainwright v. Griffin, No. 85-801.

In any event, since the en banc court of the Eleventh Circuit Court of Appeals decided this issue in conformance with settled jurisprudence of that circuit and this Court, no reason exists to grant certiorari as to this issue. If anything, the decision in Griffin, supra, is that which needs further examination.

CONCLUSION

Despite Hitchcock's attempt to frame the issues in this case as ones requiring the need for this Court's review and judgment, the very simple fact remains that the court of appeals measured claims against a record which it determined failed to support those claims. On the mitigating evidence issue, the court of appeals determined that the district court was correct in summarily dismissing the petition on this claim since the record

refuted any merit. If the court did anything at all, it merely verbalized a standard which it had theretofore utilized when considering this very issue. Using the case-by-case analysis, the court of appeals had examined state court records to see if any confusion in Florida law appreciably affected a capital sentencing proceeding to see if it could be determined whether Florida law had any effect on defense counsel's decisions at the sentencing hearing. This was explained even before the en banc decision in Hitchcock. See, Thomas v. Wainwright, 767 F.2d 738, 745 (11th Cir. 1985). If such an appellate function is, as petitioner so strongly urges, automatically subject to certiorari review, then it is equivalent to direct appellate review and of course, that is not the case.

Even assuming that there was an agreement for a life sentence, (or even if Hitchcock believed that there was such a possibility) again, the trial record fails to support a claim that the sentence of death was imposed solely because Hitchcock chose to have a jury trial. The sentence of death was imposed based on findings of fact which were clearly proven and delineated in the state trial court. Hitchcock was not sentenced to death because of going to trial; he was sentenced because of what the evidence showed and because the trial judge agreed with the jury's recommendation.

The statistical evidence argument was properly decided below and simply because one case has unexplainably been decided differently, it insufficient reason to grant certiorari review. Indeed, less than thirty days after the denial of rehearing en banc in Griffin, supra, the court denied relief when presented with the identical claim in Thomas, supra.

For the above and foregoing, the respondent respectfully requests the Court to issue its order denying the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX TO

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COUNSEL FOR RESPONDENT

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

JAMES ERNEST HITCHCOCK Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.	)	CIVIL ACTION NO. 83-357-Civ-Orl-11

AFFIDAVIT OF CHARLES A. TABSCOTT

STATE OF FLORIDA)
) SS:
ORANGE COUNTY)

Charles A. Tabscott, being duly sworn according to law, deposes and says:

1. I am an attorney duly licensed to practice my profession in the State of Florida. My office address is 46 Park Lake Street, Orlando, Florida 32803.

2. I am the attorney who represented JAMES ERNEST HITCHCOCK in pre-trial and trial proceedings in 1976 and 1977. My representation of Mr. Hitchcock was undertaken in the course of my employment as an assistant public defender.

3. I am aware of the current status of Mr. Hitchcock's case and of the claim that has been made in Rule 3.850 proceedings, and now in this proceeding, that available

evidence of relev nt non-statutory mitigatir circumstances was not investigated or presented in Mr. Hitchcock's sentencing trial.

4. I do not have an independent recollection of whether I believed the Florida death penalty statute limited consideration of mitigating circumstances to the statutory factors at the time of Mr. Hitchcock's trial. However, upon reviewing the trial transcript in Mr. Hitchcock's case, it is my opinion that during my representation of Mr. Hitchcock, my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute. I believe that I was acting in accord with such a perception on the basis of the argument I presented in the penalty phase of his trial.

5. While I now know that there is no such limitation of the consideration of mitigating circumstances, I did in the past believe that the statute limited the consideration of mitigating circumstances to the statutory factors. I do not recall precisely when my perception of the requirements of Florida law changed; however, based on my current review of the case law and transcript, it appears that my perception changed subsequent to Mr. Hitchcock's trial.

CHARLES A. TABSCOTT

Subscribed and sworn to before me this 1st day of June, 1983.

Notary Public

My Commission Expires

Notary Public State of Florida at Large
My Commission expires Aug. 4, 1984

AFFIDAVIT

I, CHARLES A. TABSCOTT, being duly sworn according to law, do hereby depose and say:

1. I am an attorney duly licensed to practice law in Florida and my present office address is 696 E. Altamonte Drive, Altamonte Springs, Florida 32701.

2. I am the attorney who represented James Ernest Hitchcock in his trial and sentencing proceedings in 1977.

3. I have previously furnished an affidavit concerning my recollection of my belief that at the time of Mr. Hitchcock's trial the presentation and consideration of mitigating circumstances under the Florida capital sentencing statute was limited to only those specifically enumerated in the statute. I reaffirm and incorporate herein my prior affidavit.

4. At the time of giving my prior affidavit, I was asked only to state whether I had believed at the time of Mr. Hitchcock's trial that the Florida statute limited the consideration of mitigating factors to only those in the statute. After review of the record, I responded that I had such a belief. Though I stated in my affidavit that I was "acting in accord with such a perception" at the time of Mr. Hitchcock's trial, I was not asked, and therefore did not respond, specifically whether I

would have operated differently had I not felt constrained by the statutory limit on mitigating circumstances. I have now been asked to respond to that question.

5. Though my independent recollection of the events surrounding my representation of Mr. Hitchcock some eight years ago is somewhat lessened by the passage of time, I have reviewed my files and the relevant portions of the trial transcript. Based upon that review I am able to relate the following:

(a) My defense strategy in the guilt phase of Mr. Hitchcock's trial was essentially two-fold. First, I sought to show that Richard Hitchcock was a more likely person to have committed the offense. Second, I sought to demonstrate the reason why James Hitchcock would have falsely confessed to the offense in order to protect his brother and his family. With regard to Richard Hitchcock, I sought to present evidence of his violent character, but the prosecutor's objections to this evidence were sustained. I sought also to present evidence of James Hitchcock's family history to show the relationship with his brother, Richard, but the prosecutor's objections were sustained as to this evidence, and my proffer of this evidence was denied. I also tried in the guilt phase to present some evidence of James Hitchcock's family and childhood history to show why he may have tried to cover up for his brother by falsely confessing, but that evidence was excluded. The only remaining evidence that I was permitted to present were the opinions of three family members that James Hitchcock was not violent. Again this evidence was intended to demonstrate that he was less likely

than his brother to have committed the offense. Accordingly, I was unable to develop evidence of James Hitchcock's social and family history, despite having it available and believing it to be relevent in defense to the charge in the guilt/innocence determination.

(b) At the penalty phase, I presented the testimony of Mr. Hitchcock's brother in an attempt to establish the statutory mitigating circumstance concerning mental condition § 921.141(6)(b)) and thus the brief biographical facts that came out -- Mr. Hitchcock "sucked on gas" when he was five or six years old, his father died when he was young, and that the family did farm work -- were intended to give substance to the fact that Mr. Hitchcock may have been mentally affected so as to meet the statutory mitigating circumstance. This is confirmed by my argument to the jury in which I argued that the statutory mitigating circumstance concerning impaired mental condition might be found by the jury. And at the same time I mentioned the biographical facts to the jury only for "whatever purposes you deem appropriate" and not as independent mitigating evidence.

(c) In my closing argument in the penalty phase I focused on trying to establish statutory mitigating circumstances -- age and mental impairment. Had I not perceived that the statute limited the consideration of mitigating factors, my closing argument would have been different. I would have argued to the jury that Mr. Hitchcock's family history and childhood

background were independent mitigating factors concerning "other aspects of the defendant's character or record, and any other circumstances of the offense."

(d) It is not possible for me to state now, eight years later, precisely what I would have done differently, other than my closing argument, had I not perceived the statute to be limiting. My approach to the penalty defense may have been significantly different and not limited to trying to establish and argue only statutory mitigating circumstances through brief biographical data. I may have developed my strategy toward showing Mr. Hitchcock as an individual and humanizing him before the jury. If I had not believed that the statute limited mitigation to the statute, the focus of my investigation for the penalty trial may have included evidence of mitigating factors not falling expressly within those enumerated by the statute.

The type of evidence that has since come to light concerning Mr. Hitchcock's potential for rehabilitation and the more fully developed childhood background is the type of evidence that would be consistent with such an approach. I believe today that I would present such evidence, had that evidence been available to me and had I known the legal right to do so.

CHARLES A. TABSCOTT

Subscribed and Sworn to before me
this 13 day of September, 1985.

NOTARY PUBLIC

My Commission Expires:

Notary Public, State of Florida
My Commission Expires March 13, 1989

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Court out of the hearing of the Jury and the court reporter.)

(Whereupon the following proceedings were had in the presence of the Court and the Jury:)

THE COURT: Ladies and gentlemen, that is all of the additional testimony that both the State and the defense wish to present insofar as aggravating and mitigating evidence is concerned.

It is now the opportunity for the Defendant to address you on this point as to what recommended sentence you will make. As I have told you just a few minutes ago, Mr. Tabscott will have the opportunity to address you first and to address you last.

Mr. Tabscott?

MR. TABSCOTT: Thank you.

Ladies and gentlemen, thank you for reconvening. I know you have all been

Rose Wheeler
OFFICIAL COURT REPORTER - 9TH JUDICIAL CIRCUIT
ORANGE COUNTY COURTHOUSE
ORLANDO, FLORIDA 32801

very patient about this and it has been a lengthy time, some two and a half weeks, really, from the time we first started this trial.

I will try not to be very long and certainly wouldn't be nearly as long as we were during the main portion of the trial as far as closing arguments are concerned.

I am not going to go over all the testimony, and the fact that I don't go over that, I don't want you to think I don't think it is important. But, I know that you all can recall it as well as I can, if not better, and I will try to hit on some of the points that I want to highlight more or less. So, anything you feel is relevant, please do consider that and don't think that we don't think it is important.

You have learned that Mr. Hitchcock, who stands before you here today, is 20 years old. You have just learned a little bit about his family background in addition to some things that you have

learned during the main portion of the trial.

You have learned that he was one of seven children born to parents who worked on a cotton farm. The mother and father picked cotton and hoed cotton, and did these type of things on a cotton farm. I would just like you to have a little bit of insight as to the Defendant's background and his upbringing, for whatever purposes you may deem appropriate.

You have learned that the Defendant's father died in 1963, that would make the Defendant approximately six or seven years old, at that time, when he died. You learned that the Defendant left home when he was 13 years old, which would not be unusual in a family that large, seven children, and that economic status, from Arkansas.

You have heard the Defendant say the reason he left home, at least one of the reasons was, that his mother started dating another individual that did not get along with him. The two did not get along,

and he indicated he did not like the way this individual treated his mother, hitting his mother and cussing at his mother. So, he has been pretty much on his own since 13, the last seven years. That is not a very long period of time, and the Defendant is still young.

You have heard Mr. Hitchcock just state today, that he sucked on gas or inhaled gas when he was five or six years old, on several different occasions, and he saw him on one occasion become unconscious. And it seemed to him, after that period of time, the Defendant's mind started to wander, and things of this nature.

Some of the other points of testimony that I would like to bring home to you, from perhaps, the previous trial, is that there was quite a bit of evidence to the effect that my client was not a violent person in the past. Richard Hitchcock and Helen Hitchcock rebutted that by saying they heard of an incident where Connie Reed, the Defendant's girl

friend was hurt by t.. Defendant. But, Connie Reed herself, came forward to testify that she was not physically harmed. There was no problem, there were no bruises. And in fact, that she stated at the time, that she loved him at this point and would like to marry him, even at this point. So, that incident was just not that aggravated of a situation.

The Defendant's mother testified that Ernie was a good child and he minded her. She testified that she had a large family, seven children.

The Defendant, himself, there are just so many points we could go over, I'm not going to go over here because I'm sure you remember them. The Defendant, himself, on the stand, brought out the fact that he was on parole. He didn't have to do that to you, but he was being truthful with you, and he is on parole, it is true, for several crimes of burglary which all happened on one night. So, he got several different convictions. In other words, each different store or

building that you would enter would be considered a different crime and a different conviction. This is what that situation involves.

Now, as the Judge indicated, you are to render an advisory sentence to him. He does not have to follow your advice, whatever your sentence is. But, I don't want you to think your role in this thing is not important, because it is very important, and the Judge does consider that. Or else, there would be no use to have this part of the proceeding. So, it is something that he is going to weigh, and I feel like he would weigh it very very strongly and heavily, although he is not legally bound, of course, to follow it, as he has instructed you and probably will instruct you again.

Now, there are several different aggravating circumstances and several different mitigating circumstances that the Judge is going to tell you that you are to consider in rendering your advisory verdict. And once again, your advisory

verdict does not have to be unanimous as was the verdict of guilty. Also, the aggravating circumstances have to be proved to you beyond and to the exclusion of every reasonable doubt just like the main evidence was.

The Judge is going to instruct you that these are the aggravating circumstances, and I would like to go over each one with you. That the Defendant is to be sentenced, the crime was committed while the Defendant was under sentence of imprisonment. This, we know, is not correct. There has not been any evidence of that, and I do not think there will be any evidence of that. The Defendant was not imprisoned, at that time. This, of course, goes to the situation where somebody is in prison or kills somebody while in prison or something like that.

The Defendant has previously been convicted of another capital offense or felony involving the use of violence to some person. We do not have either one of those situations. The Defendant has not

been convicted of another capital offense, and the only conviction we have before us here today, as far as I know, only conviction that exists are convictions for burglary. And, this is not a crime of violence and I do not think there will be or has been any testimony that any violence was involved in those burglary crimes. Burglary, breaking and entering, simply entering a building and taking something out of a building.

The Defendant created, when he committed this crime, great risk of death to many persons, like shooting in a stadium or occupied building, or something like this. We do not have that situation.

That the crime was committed to prevent the Defendant's capture or hence, his escape, or something like that; shooting a policeman when running fror him, something like this. I am giving you little examples here. That, we certainly do not have.

That the crime was committed for pecuniary gain, monetary gain. We do not

have that situation here. No robbery involved, nothing like that. No hired killing or anything like that.

That the crime was designed to disrupt or hinder lawful exercise of governmental function or enforcement of laws. Once again, we do not have anything like that.

That the crime was committed in the commission of several different, enumerated other felonies: robbery, et cetera. And, included therein is involuntary sexual battery. This is something that we previously argued before, whether or not it was in the commission. The Defendant did admit to you, there was a sexual intercourse in there. The crime used to be termed, rape. It is now sexual battery. Once again, I do not think we have any proof as to that. That is one of the aggravating circumstances, and that the crime was especially heinous, atrocious, or cruel. And then, the Judge will define heinous for you and you will have those definitions to review yourselves.

T2

Now, we are talking about something extra. Any murder, is by nature ugly, unpleasant, bad, very negative. But, we are talking about something especially heinous and atrocious and cruel. And to my mind, we are talking about mass slayings, hired killings, things of this nature. It has to be especially so. So, get away from the point that any crime, any murder is this, because that is obviously, that wouldn't even be in there if the Judge felt and the Legislature felt that all murders were especially heinous, especially atrocious or cruel. That wouldn't even be an issue for us to talk about here today. So, it has to be something very extra.

There will be then, some mitigating circumstances for you also to consider. One is, that the Defendant has no significant history of prior criminal activity. Well, I leave that up to you. You know, that he has got several burglary convictions from that one time on him. He has served time for that, and he was on

parole for that. It is up to you whether you consider that a significant history of prior criminal activity.

Crime for which the Defendant is to be sentenced is committed while he is under extreme mental or emotional disturbance. And, perhaps, that would go along with another one that is further down. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both of those, the way I read them, are talking about mental capacity and things of this nature. Well, once again, I will leave this up to your discretion and decision.

There has been some testimony the Defendant, when he was five or six years old, inhaled gas and it did affect him somewhat mentally, according to James Hitchcock, the Defendant's brother.

And then, two or three others which I do not feel are relevant or applicable to this case in the mitigating

circumstances. Victim was a participant in the Defendant's act. That one, she was obviously not a participant in the commission. However, you could consider, perhaps, that in the commission of the sexual intercourse involved. The Defendant was an accomplice in the offense and Defendant's participation was relatively minor. We do not have that situation according to your verdict.

Of course, the Defendant did indicate that he was not the individual that committed this murder, but it was his brother. That, of course, you could consider his testimony as to that. But, you have made your decision on that, and apparently, you did not go along with that. So, for the purposes of argument, this one may not apply.

That the Defendant acted in extreme duress or in the domination of another person. Once again, the same argument would apply to that one.

And then, finally, I would like you to consider the age of the Defendant at

the time of the crime, same age he is now; 20 years old. He is still a young man. He has a lot to live for.

Of course, if you vote for the death penalty, and if the Judge imposes the death penalty, he has nothing else to live for. If he is to be incarcerated for life, he will be incarcerated for a minimum of 25 years. There will be no parole, no anything for 25 years. And only, at the end of 25 years do they begin to even consider thinking about him for parole. So, the Defendant would spend, if he got life imprisonment, more than his own age at this time. And even if he got out, the bare minimum, it would be 25 years from now.

And, people are rehabilitated, it does work in spite of maybe, all the propaganda that we hear about the Florida system. I would like to think, it is a good system and that there is a chance for this man, who is still young, who is capable to eventually lead a good life. So, this is an important factor that I would

like you to take into consideration. That is, his age.

The crime, as I indicated to you before, was certainly a crime of passion. It was not a crime that was thought out previously. You may have felt that there was advanced thinking about it, to the sufficiency, that it was pre-meditation. I am talking about sitting down and planning a crime. Certainly, none of that. Without question, it was a crime of passion, an emotional situation. The Defendant, after it was all over, went back into the house and spent the rest of the night there. Obviously, this does not indicate somebody that was thinking coolly, calmly and rationally about what had happened.

Also, I would like you to take into consideration, the Defendant did turn himself in Had ample opportunity to leave that night. I have made this point before, and I feel it is important for this part of the trial. Had all the next day to leave and probably could have

been long gone, and never here before you at this time. And, he is, because of his own doing, because he voluntarily turned himself in to the Winter Garden Police Department. So, that is all I have to say at this point.

I may have a few more comments after the State Attorney will talk to you. I don't know that I will, but I may, depending upon what he says. My opportunity is to rebut him and not really offer anything new the next time I come back.

So, we ask you and urge you and pray that you will return your advisory sentence of life imprisonment as opposed to the death penalty.

Thank you.

THE COURT: Mr. Micetich?

MR. MICETICH: Thank you, Your Honor. May it please the Court.

Ladies and gentlemen of the Jury; at this time, I have the one opportunity to talk to you. At this time, we are concerned with the phase of the trial concerning the sentence and there are two

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES E. HITCHCOCK,

Appellant,

vs. CASE NO.

THE STATE OF FLORIDA,

Appellee.

_____/

A F F I D A V I T

STATE OF FLORIDA)
COUNTY OF ORANGE) SS:

Before me this day personally appeared Charles A. Tabscott, who, being first duly sworn, deposes and says:

1. That he is employed by the State of Florida, Office of the Public Defender, Ninth Judicial Circuit.

2. That he was the attorney assigned to handle the defense of this case.

3. That on the morning of January 18, 1977, before the commencement of the trial of this case, a discussion was held between the Honorable Maurice M. Paul, Judge, Circuit Court, in and for Orange County, Florida, the Assistant State Attorney Joseph P. Micetich, Jr., and the affiant, and at that time, Judge Paul indicated he would accept a plea of nolo contendere as charged and that the Appellant would be sentenced to life imprisonment.

4. That the Assistant State Attorney, Joseph P. Micetich, Jr., agreed to the above arrangement.

5. That the affiant presented this arrangement to the Appellant and the Appellant declined it and indicated that he desired a jury trial.

DATED this ___ day of February, 1977.

_____
CHARLES A. TABSCOTT
Affiant

SWORN to and SUBSCRIBED before at Orlando, Orange County, Florida, this ___ day of February, 1977.

My Commission Expires:

_____
NOTARY PUBLIC, State of Florida
at Large

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

INFORMATION NO. CR 76-1942

STATE OF FLORIDA,

Plaintiff,

vs.

JAMES ERNEST HITCHCOCK

_____/

A F F I D A V I T

On January 17, 1977 the State Of Florida, represented by the undersigned Joseph Micetich Jr., did discuss with Mr. Charles Tabscott, the attorney representing defendant JAMES ERNEST HITCHCOCK the possibility of said JAMES ERNEST HITCHCOCK entering a plea of guilty to the charge of murder in the first degree. The State Of Florida offered to recommend a life imprisonment sentence with a mandatory minimum twenty-five year sentence in return for the said defendant's plea of guilty as charged to murder in the first degree.

On January 18, 1977 this plea discussion was brought to the attention of the Honorable Maurice M. Paul, the judge who presided over the case at trial. Judge Paul indicated that he would consider the State Of Florida sentence recommendation, should the said defendant actually plead guilty as charged. At no time did said defendant ever indicate that he would plead guilty and at no time did Judge Paul ever indicate what sentence he would actually pronounce upon said defendant before the time of the actual sentencing, after trial, on February 4, 1977.

Joseph Micetich, Jr.
Assistant State Attorney
250 N. Orange Avenue, Suite 400
Orlando, Florida 32802
420-3783

Sworn to and subscribed before me this 15th day of January, 1980.

NOTARY

Notary Public, State of Florida at Large
My Commission Expires Nov. 18, 1983
Bonded by American Fire & Casualty Company

My Commission expires _____.